No. 18-1193

In The
Supreme Court of the United States

BRANDON LEE MOON,

Petitioner,

v.

COUNTY OF EL PASO;
COUNTY OF EL PASO ASSISTANT
DISTRICT ATTORNEY JOHN DAVIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY FOR PETITIONER

JANE M.N. WEBRE
Counsel of Record
WILLIAM G. COCHRAN
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300
jwebre@scottdoug.com

Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

PARTIES TO THE PROCEEDING BELOW

Petitioner names the County of El Paso as a respondent because it is not "petitioner's belief" that the County of El Paso is a party below that has "no interest in the outcome of the petition" under Rule 12.6. The County of El Paso is aligned with Respondent Davis and is providing representation for Davis through the El Paso County Attorney. Respondent County of El Paso states that it is not a "party of interest" or a "party in interest," and that it "makes no additional response to [the] petition." BIO 21-22. Petitioner will address this issue in more detail below at Part III of the Reply.

The Rule 12.6 statement in the petition otherwise remains accurate.

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REPLY FOR PETITIONER

The Brief in Opposition offers no meaningful analysis of the circuit split at issue. Instead, respondents try to evade the circuit split by inventing an illusory rule without engaging or even quoting from the relevant circuit decisions. Respondents then try to distract from the question presented by reciting a competing factual narrative on the merits. But given the preliminary nature of the immunity question presented by the petition, respondents' competing factual narrative is both premature and irrelevant. The Fifth Circuit squarely decided the legal issue presented to this Court, thus giving rise to a circuit split and conflict in principle among the Circuits.

Respondents also try to manufacture a dispute as to whether Respondent County of El Paso has an interest in the outcome of the petition under Supreme Court Rule 12.6. It is not "petitioner's belief" that the County of El Paso has "no interest in the outcome of the petition" under Rule 12.6, because the County of El Paso is aligned with Respondent Davis and is providing representation for Davis through the El Paso County Attorney. The County of El Paso indicates that it does not wish to file documents with this Court in connection with the petition. That does not change petitioner's belief as to whether the County of El Paso has an interest in the outcome. Regardless, respondents do not dispute that Respondent Davis has an interest in the outcome of the petition and is properly situated, thus clearing the way for review.

At bottom, respondents' efforts do not change that this case presents an ideal vehicle to resolve the circuit split and clarify the scope of prosecutorial obligations and immunities in the post-conviction DNA context. Respondents raise no issue or barrier sufficient to justify denial of review. The Court should grant review.

I. Respondents cannot evade the circuit split by inventing a rule untethered to the circuit decisions at issue.

Respondents try to dodge the circuit split by distilling the relevant circuit decisions to an illusory rule that absolute immunity turns on "advocacy" alone, regardless the prosecutor's involvement in ongoing judicial proceedings. BIO 11–12 ("As long as an advocacy function, as here, is being performed, all of the circuit courts hold that absolute immunity applies. . . . They all hinge on advocacy."). A bare reading of the cases belies that assertion. *See* Pet. 9–18. The Brief in Opposition contains no discussion of—or even a quotation from—any relevant circuit decision. *Id.* Rather, respondents give the Court a mass citation to those decisions with misleading explanatory parentheticals paraphrased to suit the rule respondents fashioned out of whole cloth. *Id.*

For example, respondents purport that *Yarris* holds that "absolute immunity hinges on [a] showing of advocacy," without regard for the prosecutor's involvement in ongoing judicial proceedings. *See id.* at 11–12 (citing *Yarris v. County of Delaware*, 465 F.3d

129, 137–38 (3d Cir. 2006)). In reality, *Yarris* holds that immunity hinges on prosecutors' showing that the challenged action "was a part of their advocacy for the state *in post-conviction proceedings in which they were personally involved*." 465 F.3d at 138 (emphasis added). Respondents make no effort to engage the actual holding of *Yarris*.

Similarly, respondents purport that *Spurlock* holds that "[an] advocacy showing [is] key to immunity"—again, with no mention of involvement in ongoing judicial proceedings. BIO at 11–12 (citing *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003)). In reality, *Spurlock* holds that "[a]bsolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings, including direct appeals, habeas corpus proceedings, and parole proceedings, *where the prosecutor is personally involved in the subsequent proceedings and continues his role as an advocate*." 330 F.3d at 799 (emphasis added). Again, respondents make no effort to engage the actual holding of *Spurlock*.

Respondents concede that the challenged conduct here took place "in a quiet period between Moon's various post-conviction judicial proceedings." *Id.* at 10–11. That is the exact fact pattern petitioner uses to highlight the circuit split. *See* Pet. 13 ("In *Yarris*—as in this case—more legal proceedings followed the challenged action until the plaintiff's exoneration about fourteen years later."). Respondents also concede that Respondent Davis took action "during the course of ongoing judicial proceedings *and thereafter*." BIO at i (emphasis

added). Respondents pretend the distinction between "during" and "thereafter" has no significance. But that distinction is the crux of the question presented: Does absolute immunity apply both "during" ongoing judicial proceedings and also "thereafter"? The Fifth Circuit below said yes. The other Circuits say no. Petitioner is asking this Court to review that question and clarify the answer.

There is a clean circuit split ripe for review by this Court. This case is an ideal vehicle to resolve that split. Respondents cannot evade that reality.

II. Respondents' improper competing factual narrative is not relevant to the preliminary immunity question presented by the petition.

Respondents devote the majority of their Brief in Opposition to disputing the facts as alleged by petitioner and portraying the record in the light most favorable to respondents. *See* BIO 15–21. As an initial matter, respondents' self-serving factual recitation presupposes an improper standard of review. The proper rule is rote. When a "case comes to [this Court] on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), [the Court] assume[s] the truth of the facts as alleged in petitioner['s] complaint." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009); *see Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993) (citation omitted) ("Because this case comes to us on a motion to dismiss the complaint, we assume that we have

truthful factual allegations before us . . . though many of those allegations are subject to dispute.").

Still, because the question presented deals only with the Fifth Circuit's dismissal of claims based on the affirmative defense of absolute immunity, respondents' competing factual narrative regarding the merits is both premature and irrelevant. *See Lewis v. Tripp*, 604 F.3d 1221, 1224 (10th Cir. 2010) ("Before we can address the parties' factual dispute . . . we must first confront [the] preliminary question [of immunity] concerning our authority to do so."). As this Court has held, "whether a complaint has adequately alleged a cause of action for damages . . . is irrelevant . . . to the question whether the conduct of a prosecutor is protected by absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993).

Illustrating their misunderstanding of the preliminary nature of the immunity issue, respondents go to great length to argue that Respondent Davis's actions are "not the action[s] of a prosecutor who has an evil purpose or is trying to hide material evidence." BIO 20. But "[e]vidence concerning the defendant's subjective intent is simply irrelevant to [an immunity] defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

The question presented is whether absolute immunity shields Respondent Davis's actions given their occurrence outside the scope of his personal involvement in ongoing judicial proceedings, as alleged by petitioner. Respondents' competing factual narrative is not relevant to that question.

III. It is not "petitioner's belief" that the County of El Paso has "no interest in the outcome of the petition"; but even so, respondents do not dispute that Respondent Davis has an interest in the outcome and is properly situated, thus clearing the way for review.

Under Supreme Court Rule 12.6, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition." The apparent purpose of Rule 12.6 is to provide interested and potentially interested parties with an adequate opportunity to file documents in this Court and to seek relief in connection with the petition. Respondent County of El Paso states that it is not a "party of interest" or a "party in interest," and that it "makes no additional response to [the] petition." BIO 21–22. But Rule 12.6 focuses on "the petitioner's belief," rather than the respondent's position.

Petitioner names the County of El Paso as a respondent because petitioner in good faith does not believe the County of El Paso has "no interest in the outcome of the petition" under Rule 12.6. For the entire twelve-year history of this case, the El Paso County Attorney has represented both Davis and the County of El Paso. Davis has consistently filed pleadings in tandem with the County of El Paso and other County of El

Paso-related defendants.[1] In these instances, the County Attorney has often portrayed Davis and the County of El Paso as aligned in interest. Respondents have conversely treated their separate state co-defendants as separate parties represented by separate counsel with separate interests in the litigation. *See*, *e.g.*, ROA.230 (identifying state Attorney General's Office as counsel for state co-defendants in certificate of service). Moreover, counsel from the County Attorney's Office filed respondents' joint Brief in Opposition here. BIA 22. In other words, despite respondents' "dispute" over the status of the County of El Paso as to the petition, the County of El Paso is providing legal representation for Davis through the County Attorney.

Given respondents' historical relationship with one another—including that the County Attorney currently represents Davis—petitioner believes the County of El Paso is adverse to petitioner such that it may intend to file documents with this Court or seek relief in connection with the petition. The Brief in Opposition indicates that the County of El Paso does not plan to do so. BIO 21–22. But that does not change "the

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[1] *See*, *e.g.*, ROA.225–.230 (Motion to Dismiss or Transfer Venue filed jointly by Defendants, including County of El Paso and ADA John Davis); ROA.594–.605 (Defendants' Reply to Plaintiff's Response to Motion to Dismiss or Transfer Venue filed jointly by Defendants, including County of El Paso and ADA John Davis); ROA.1042–.1051 (Defendants' Motion to Stay Discovery filed jointly by Defendants, including County of El Paso and ADA John Davis); ROA.1543–.1547 (Defendants' Motion for a Protective Order filed jointly by Defendants, including County of El Paso and ADA John Davis).

petitioner's belief" that the County of El Paso is not a party below that has "no interest in the outcome of the petition" under Rule 12.6. At the very least, petitioner believes the County of El Paso has an interest in the outcome of the petition to the extent it affects the nature of the County Attorney's continued representation of Davis.

In any event, respondents do not dispute that Davis has an interest in the outcome of the petition and is properly situated as a respondent. Thus, even if the Court concludes that Respondent County of El Paso is not a "party of interest" or a "party in interest"—whatever the meaning of those phrases as used in the Brief in Opposition, *see* BIO 21–22—the Court should still grant the petition as to Respondent Davis.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JANE M.N. WEBRE
Counsel of Record
WILLIAM G. COCHRAN
SCOTT DOUGLASS &
MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300
jwebre@scottdoug.com

Attorneys for Petitioner